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King County Prosecutor
Appellate Unit

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NO. 57081-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

VASQUEZ DEPAZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable John P. Erlick, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in dismissing Juror 3. 10RP 11-14.¹
2. The trial court erred in denying appellant's motion for a new trial. 11RP 7, 13.

Issues Pertaining to Assignments of Error

1. Did the trial court violate appellant's state and federal rights to due process and to a unanimous and impartial jury, when the court dismissed a deliberating juror, over defense objection?
2. Do the state and federal constitutions prohibit dismissal of a deliberating juror where the record reveals a possibility that the juror was dismissed based on her view of the sufficiency of the state's evidence?

B. STATEMENT OF THE CASE

1. Procedural Facts

On January 19, 2005, the King County prosecutor charged appellant Vasquez Jose Depaz with two counts of first degree rape of a child. CP 1-6; RCW 9A.44.073. After the case was set for trial, the state amended

¹ This brief cites to the Verbatim Report of Proceedings as follows: 1RP - June 29, 2005; 2RP - June 30, 2005; 3RP - July 5, 2005; 4RP - July 7, 2005; 5RP - July 11, 2005; 6RP - July 12, 2005; 7RP - July 13, 2005; 8RP - July 14, 2005; 9RP - July 15, 2005; 10RP - July 18, 2005; 11RP - October 7, 2005.

the information and added two additional counts of first degree rape of a child. CP 7-8; 2RP 3.

Trial commenced on June 30, 2005 before the Honorable John Erlick. 2RP 6. After seven hours of deliberation, the jury indicated it was deadlocked. CP 64; 9RP 2. The trial court instructed the jury to continue its deliberations. CP 65. Subsequently, two of the deliberating jurors were then replaced with alternate jurors. 10RP 14. The newly composed jury returned a guilty verdict on count I and acquitted on the three remaining counts. CP 36-39.

2. Substantive Facts

On January 13, 2005, Grace Fernandez called 911 to allege that her eleven year-old daughter, Marisol Pena, had sex with their adult neighbor, Vasquez Jose Depaz. 5RP 76-77; 6RP 334. Officers George Baseley and David Gavurnik responded to the call. 5RP 76-77. They initially spoke to Fernandez and then contacted Depaz at his home. 5RP 79, 86.

Baseley speaks some Spanish and asked Depaz for a license or identification. 5RP 89. Depaz produced a Washington ID card from his wallet in the name of Eugenio Rojas. 5RP 90-92. Baseley then asked him if anyone named Jose lived at the residence and Depaz told him no. 5RP 92. However, Fernandez had pointed out Depaz to Gavurnik and the

officers arrested him. 5RP 93, 127. During a search incident to arrest, the officers recovered a photo of Pena in Depaz's wallet with "Jose, I love you my sexy baby" written on the back. 5RP 102-03. The officers also recovered a note from Pena, a piece of paper with Pena's name, phone number, and address, and three condoms from Depaz's wallet. 5RP 104, 107-08.

Gavurnik drove around with Pena and Fernandez to try and locate the place where Pena said Depaz had driven her. 5RP 134-36. They drove around for at least an hour, but were unable to find any location where Depaz may have taken Pena. 5RP 136. Gavurnik also impounded a Chevrolet Astro van because it was a possible crime scene. 5RP 129. The van belonged to Depaz's roommate. 5RP 129.

The crime scene investigation unit recovered fingerprints and hair from the van, but they did not match either Depaz or Pena. 7RP 34-35. A special light source was used to try to locate biological fluids in the van, but none were found. 7RP 51, 53. A corner of a condom wrapper, matching the lot number of the condoms found in Depaz's wallet, was recovered from the step panel on the driver's side of the van. 5RP 109; 7RP 49. Depaz explained that the condoms found in his wallet were from a box of condoms that he and his roommates had shared. 7RP 86-87.

Depaz hardly ever used his roommate's van because the steering wheel was too high for him. 7RP 85.

Marisol Pena was born on April 19, 1993. 6RP 156. She testified she first met Depaz during the summer of 2004. 6RP 164. He lived in the same apartment complex across the courtyard from her family's apartment. 6RP 164. Pena noticed that he would look at her through her bedroom window. 6RP 165. She first spoke to Depaz in the laundry room some time before Halloween. 6RP 168. Depaz gave her his phone number and told her he thought she was pretty. 6RP 170-71. A week later Depaz called Pena on her mother's cell phone. 6RP 172. She answered but hung up without speaking to him. 6RP 172.

On Halloween, Pena spoke to Depaz and they arranged to meet in the alley behind her house. 6RP 183. Depaz picked up Pena in his car. 6RP 187. Although Pena had told the detectives that there was no physical contact until after Thanksgiving, she testified in court that she and Depaz kissed while parked in the alley on Halloween. 6RP 187, 282. When Pena went back to her house that night, she lied to her mother about where she had been. 6RP 283. Pena first told her mother that she had gone to a neighbor's house, and later told her that a black man chased her around the park and prevented her from getting back home. 6RP 283.

According to Pena, after Thanksgiving, Depaz began picking her up after school. 6RP 201. On Tuesdays and Thursdays Pena usually had band practice after school. 6RP 303. Depaz picked her up on several Tuesdays and Thursdays in his roommate's van. 6RP 201-02, 216. Depaz took her to the Best Buy parking lot, a friend's house, and his own house to have sex. 6RP 223-29, 238-41, 252. Pena's mother eventually found out that Pena and Depaz had sex because Pena missed the bus from school one day while hanging out with Derek, a boy who went to her school. 6RP 256-57. Pena's mother called her school and found out that there had been no band practice for the past month. 6RP 256. When Fernandez confronted her about it, Pena told her mother several different stories about where she had been when she said she was at band practice. 6RP 258-59. Pena told her mother that she had gone to the park, that she had been hanging out with Derek, and that she had been at some girl's house. 6RP 259. Fernandez didn't believe her and Pena eventually told her mother the she had been having sex with Depaz. 6RP 259. Fernandez then called the police. 6RP 260.

The day after the 911 call, Detective Anthony Stevenson met with Pena at her school and interviewed her. 6RP 273. A few weeks later, Joanne Mettler, a nurse at Harborview Center for Sexual Assault and

Traumatic Stress, examined Pena. 5RP 17, 22-23; 6RP 274. Pena told her that she had sex five or more times with Jose and that he used a condom. 5RP 30, 33. Mettler's examination revealed that Pena's hymen had notches, tears that had healed, at the eight and four o'clock positions, indicating that there had been penetration in the past. 5RP 47. However, the penetration was not necessarily the result of sexual intercourse. 5RP 65. Mettler concluded that because Pena's notches were between the three and nine o'clock positions, they were trauma-related injuries. 5RP 50. However, Mettler acknowledged that some treatment providers think notches between three and nine o'clock are indicative of some type of penetration while others think it is a characteristic people are born with. 5RP 49-50.

Depaz testified that he is originally from Guatemala. 7RP 75. In October of 2004, Depaz moved in with his roommates in Lake City. 7RP 76. He would see Pena in the apartment complex while picking up mail and she introduced herself to him. 7RP 77. Eventually Depaz and Pena became friendlier and Pena began leaving notes for him. 7RP 78-79. Pena told him he was handsome and that she liked him. 7RP 80. Pena also called him on the phone every day. 7RP 81. Depaz became so concerned with Pena's behavior that he decided to move out of the apartment complex.

7RP 84-85. Depaz told Pena in December that he planned to move in January. 7RP 85. Depaz testified that he never kissed or had sex with Pena. 7RP 87-88.

3. The Erroneous Dismissal of Juror 3

The jury was impaneled on July 7, 2005. Supp. CP __ (Sub. No. 55, Trial Minutes at 7). Testimony began on July 11, 2005 and the case was submitted to the jury at 11:30 a.m. on July 14, 2005. Supp. CP __ (Sub. No. 55, Trial Minutes at 11); 5RP 16; 8RP 63. At 10:50 a.m. on July 15, the jury sent a note indicating that it was deadlocked on all four counts and that several jurors would not change their votes. CP 64; 9RP 8. The court responded by instructing the jury to continue deliberations. CP 65. After the lunch break, the court received another inquiry:

One of us overheard another juror at lunch talking on the phone saying "It's all circumstantial evidence. The judge said we have to continue to deliberate. We're at lunch now. I'm just being me, the badgering has begun." Please advise if this requires a change in the composition of the jury or if we should keep going as we are.

CP 40.

The trial court indicated its intent to question the presiding juror, the juror who overheard the conversation, and the juror who had the conversation. 9RP 8. Defense counsel objected to questioning the jurors because the conversation described in the jury note was not the type of

misconduct that injected extrinsic evidence into the deliberations and the alleged comment was made in the context of the length of deliberations. 9RP 9. Furthermore, defense counsel argued that the juror already felt "badgered," and singling her out would put even more pressure on her to change her mind. 9RP 9-10.

Over defense objection, the court questioned the three jurors. 9RP 14-25. Juror 14 testified that she was walking to lunch with Juror 3, who told her that she needed to make a phone call because her grandchild was having surgery. 9RP 16. Juror 14 overheard Juror 3 say "well, we're at lunch; the Judge says we have to keep deliberating; all the evidence is circumstantial; the badgering has started, and I will." 9RP 16. The court then inquired of Juror 3 as follows:

THE COURT: And can you just generally tell use what the nature of the conversation was?

JUROR 3: I asked [my husband] about a grandson who's undergoing some very serious surgery today, how that was going, and then he -- because I had indicated earlier in the day that I didn't know whether we would be through today or not, I had also indicated to him earlier in the day that I thought I was in the minority in my opinion, and let it go at that, and so he asked me that question how things were going and did I -- and would I argue persuasively to convince others of my view, and that's kind of where it was.

THE COURT: Did you have any substantive conversation about this case at all with your husband? When I say

substantive, I mean did you discuss with him the nature of the charges that have been brought or any of the evidence?

JUROR 3: No.

THE COURT: Okay. During the conversation, did you tell him that, in your opinion, the case rested on circumstantial evidence?

JUROR 3: I may have used that word. The other person thought I did so I may have used that word.

THE COURT: Why did you tell him about that?

JUROR 3: Because we were at a point where it was 11 to 1 and I was beginning to feel that I was being badgered by the others.

THE COURT: But what does that have to do with circumstantial evidence or not?

JUROR 3: Probably nothing.

THE COURT: Did you have any substantive discussion about the case at all? In other words, did he know what type of case it was?

JUROR 3: No.

THE COURT: Other than what you talked to him about this afternoon and what you indicated this morning that you weren't sure how long the deliberations were going to go, did you have any other discussions with your husband about this case?

JUROR 3: No. Other than to say I'm in criminal court.

THE COURT: Okay. Did you discuss this case with anyone else other than your husband?

JUROR 3: No.

THE COURT: Did you tell him about being in the minority?

JUROR 3: I did that this morning. When I was leaving the house, he asked me, well, when are you going to be back. We're both very worried about the grandson.

9RP 21-23.

The prosecutor continued the questioning:

MR. HUNG: Good afternoon, ma'am. There's been some testimony that in response to something that your husband said to you, you said I will. Do you remember that part of the conversation at all?

JUROR 3: It was, well, let me know when you're through, and I will. I believe that's the way it ended.

MR. HUNG: Oh, I see. So, at any point, did your husband try and support you in maintaining your position as the minority or anything like that? Did he say anything or offer any advice?

JUROR 3: Not in the phone information, no.

MR. HUNG: Well, in any other aspect?

JUROR 3: No. Nothing other than saying, well, if you feel strongly in that way, you know, in your view, if you feel strongly in that, stick to your guns.

9RP 24.

THE COURT: If the jury were to continue its deliberations, do you feel that you are in a position to continue to deliberate?

JUROR 3: We are continuing to discuss, and we are trying

--

THE COURT: Don't get into the substance of your --

JUROR 3: Excuse me. We are continuing to discuss, yes.

THE COURT: And do you feel that you can continue to do so in light of our discussions this afternoon with the presiding juror and with other jurors?

JUROR 3: I'm continuing to participate in the conversation.

9RP 25.

The prosecutor asked the court to excuse Juror 3 "in an abundance of caution," even though he did not think this was a situation where extrinsic evidence was brought into the jury room or where the remaining jurors had been affected. 9RP 27. The defense opposed dismissal, and reiterated that Juror 3's comments were made in the context of discussing her grandson's surgery and when she would be done with the case, and that there was nothing said or done that would impact the deliberative process.

9RP 27-28.

The trial court ruled:

With respect to Juror 3, I'm, obviously, disturbed both that she had this conversation and perhaps more disturbed that we were advised of what the numbers are with respect to their voting. I would prefer not to have known that because I don't want to be influenced by that in any way. The question is whether this rises to the level of misconduct that we conclude that this juror cannot be fair and impartial

because she has received outside information or influence, and the case law is pretty clear on what is improper outside influence and Mr. Hung has identified the type of cases that we look at such as experimentation, going out investigating a scene, looking up words in a dictionary where, essentially the juror is deciding the case on information outside of that presented in the courtroom.

I understand the state's position on this in that the juror's put herself in an unusual situation, which she's disclosed to her husband that she's of a belief as to the guilt or lack of guilt of the defendant, that she feels that perhaps pressure being put on her by other jurors, and then the encouragement by her husband to stick to her guns, and the question then becomes whether or not that creates a marital rift or other problem if she decides -- if she does, in fact, change her mind. I would conclude that this does not rise to the level of misconduct based on the information provided by the three jurors that we interviewed that would require disqualification of Juror 3 at this time based on the information that we have. She's indicated that she believes that they're continuing to discuss the case, and that they continue to deliberate, and I intend to letting them [sic] continue to do so.

State's motion to disqualify Juror 3 is denied. Counsel, I'm going to complete the question that was asked. Is there another question that they're going to have?

9RP 29-30 (emphasis added).

Approximately fifty minutes after the court's written response that the jury should keep deliberating as currently composed, the jury submitted another inquiry, which read:

None of us has changed our opinion since this morning. (enough to get any closer to a verdict) Several of us have various medical and other commitments for next week. One

juror has a commitment for Monday she cannot get out of and another has an out of town business trip set for Tuesday through Thursday. We were asked to commit up to July 15. Where do we go from here?

CP 42; Supp. CP __ (Sub. No. 55, Trial Minutes at 15-16).

Upon learning of the jury's scheduling issues, the prosecutor renewed the motion to excuse Juror 3. 9RP 32. The prosecutor now argued that Juror 3's hesitation in answering one question and speed in answering another indicated she was not being truthful. 9RP 33. The prosecutor also argued that Juror 3 was failing to deliberate. 9RP 33-34.

The defense responded that nothing had changed since the court's ruling to keep Juror 3 on the panel and also pointed out that the court's own instructions provided that a juror should not change his or her opinion just to reach a verdict. 9RP 36. The court then called out the jury and asked if there was a reasonable probability of reaching a unanimous verdict within a reasonable amount of time. 9RP 38. The presiding juror answered in the negative and the other jurors concurred. 9RP 38. After confirming that the jury was still deadlocked, the court began to reconsider its original decision to keep Juror 3 on the panel:

And it's just that if the misconduct jumped out and I could say this is clear misconduct, and it has nothing to do with this being a hold-out juror, then I would do it. But it's the type of misconduct, and I realize what you are asking me to do, Mr. Hung, which is put that aside, infer that she

wasn't being totally transparent with us, which she may not have been; I'm still not persuaded as to her response on why it wasn't circumstantial, about why she was discussing the fact that it was a circumstantial evidence case --

9RP 39-40.

Prior to adjourning for the weekend, the court called in the jury and verified that Juror 6 would be unavailable all day on Monday. 9RP 38. The court then excused Juror 6 based on her unavailability and deferred making any further decision on whether to excuse Juror 3 until Monday morning. 9RP 51, 53.

On Monday morning, the court questioned the two alternate jurors and determined they both remained able to serve. 10RP 4-10. It was only after deciding that both alternates were fit to serve that the court announced it would reverse its original position and dismiss Juror 3. 10RP 11. The court stated that it would replace Juror 3, concluding she was no longer impartial, had failed to follow the court's instructions, and was improperly influenced by an outside source. 10RP 14.

After replacing both the unavailable juror and the holdout juror with alternates, the newly constituted jury returned a guilty verdict on count I. CP 39.

4. Sentencing and Post-Trial Motion

On July 28, 2005, the defense submitted a motion for a new trial based on the erroneous dismissal of Juror 3. CP 66-72. The court denied the defense motion and imposed an indeterminate sentence with a minimum term of 100 months and a maximum term of life imprisonment. 11RP 7, 13.

C. ARGUMENT

THE COURT'S DISMISSAL OF JUROR 3 WAS CONSTITUTIONAL ERROR DEPRIVING DEPAZ OF THE RIGHT TO A UNANIMOUS AND IMPARTIAL JURY.

The trial court received a note from the jury indicating that a juror may have committed misconduct by communicating with a non-juror about the case. After questioning the jurors involved, the trial court learned that the juror who had the conversation was the lone holdout. The trial court initially determined that the juror should remain on the panel and continue deliberating. However, the trial court ultimately reversed its position. In removing the lone holdout from the jury, the trial court erred and denied Depaz his constitutional rights to due process and to an unbiased and unanimous jury. Consequently, this Court should reverse the conviction and remand for a new trial.

1. The Constitution Requires Reversal if The Record Reveals Any Reasonable Possibility Juror 3 was Dismissed Based on Her View of the Evidence.

The Washington Constitution guarantees persons accused of a crime the right to due process and to a unanimous verdict by a fair and impartial jury. Const. art. 1, §§ 3, 21, 22; State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). The United States Constitution guarantees the right to a unanimous jury in federal prosecutions, and to due process of law. U.S. Const. amends. 6, 14; Duncan v. Louisiana, 391 U.S. 145, 177, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). A trial court's dismissal of a deliberating juror violates the constitutional right to a unanimous verdict if there is any possibility the dismissal stems from the juror's doubts about the sufficiency of the evidence. State v. Elmore, 155 Wn.2d 758, 771, 123 P.3d 72 (2005) (citations omitted). Although a court has discretion to determine whether a juror's misconduct constitutes just cause for removal, that discretion is very narrowly constrained in this circumstance. Id., at 778; United States v. Symington, 195 F.3d 1080 (9th Cir. 1999); United States v. Thomas, 116 F.3d 606 (2nd Cir. 1997); United States v. Brown, 823 F.2d 591 (D.C. Cir. 1987); People v. Garcia, 997 P.2d 1 (Colo. 2000).

Elmore is the controlling law. In Elmore two jurors separately sent notes to the judge alleging Juror 8 refused to follow the court's instructions and said "[t]he law is shit and I won't convict anyone based on what the law says." Elmore, 155 Wn.2d at 763. The court then questioned the two jurors who wrote the notes. Id. Over defense counsel's objection, the trial court dismissed Juror 8 without questioning him, based solely on the notes and the testimony of the two complaining jurors. Id., at 764.

After the prosecution sought to bolster the court's decision for appellate review, the trial court decided to question Juror 8. Juror 8 denied the allegation that he said the law was "shit" and denied refusing to follow the law or refusing to convict regardless of the law. Id., at 765. However, Juror 8 did explain that he made comments regarding the credibility of the evidence and of the witnesses. Id. The court's written findings stated that Juror 8 was not credible, refused to participate, refused to follow the law as instructed, the complaining jurors were credible, and Juror 8's dismissal was not based on any valid disagreement with other jurors, including disagreements about witness credibility. Id., at 765-66. The court replaced Juror 8 with an alternate, and the newly constituted jury found Elmore guilty. Id., at 766.

On appeal, Elmore argued that the dismissal of Juror 8 was error where there was evidence that Juror 8's disagreement with other jurors was related to the sufficiency of the evidence. Id. The Elmore Court adopted the rule that:

where a deliberating juror is accused of refusing to follow the law, that juror cannot be dismissed when there is any reasonable possibility that his or her views stem from an evaluation of the sufficiency of the evidence.

Id., at 778. See also, State v. Johnson, 125 Wn. App. 443, 457, 105 P.3d 85 (2005) (holding that the trial court erred in dismissing a juror where the record showed, after four days of deliberations, that the juror "disagreed with the other jurors at least in part because she had different views regarding the merits of the case"); People v. Gallano, 290 Ill. Dec. 640, 821 N.E.2d 1214, 1224 (2004) (trial court erred in dismissing a juror who expressed a reasonable doubt in the state's evidence).

Although there was conflicting evidence about the nature of the jurors' dispute, the last line of one of the juror's notes indicated that Juror 8 disagreed with the others about witness credibility. Id., at 778. Despite the trial court's findings -- that the complaining jurors were credible, the dismissed juror was not credible, and that Juror 8 was not dismissed for any valid disagreement with the other jurors, including disagreement about witness credibility -- the Elmore Court reasoned that the trial court's

conclusion recognized there had been some valid disagreement about the merits of the evidence. Id.(emphasis added). Therefore, the trial court erred when it failed apply the "any reasonable possibility" standard when assessing the conflicting evidence. Elmore's conviction was reversed and the case remanded for a new trial. Id. at 780.

2. The Trial Court Failed to Apply the Appropriate Evidentiary Standard.

A trial court may not dismiss a deliberating juror if "there is any reasonable possibility that his or her views stem from an evaluation of the sufficiency of the evidence." Elmore, 155 Wn.2d at 778. Only after the trial court has applied the "any reasonable possibility" standard will an appellate court review the decision to remove a juror for an abuse of discretion. Id. Here, as in Elmore, the record does not indicate that the trial court applied the "any reasonable possibility" standard to its dismissal of Juror 3.

In its initial ruling, the trial court identified the relevant inquiry as whether Juror 3's phone conversation rose to the level of misconduct that would prevent her from being fair and impartial due to outside information or influence. 9RP 29. Based on the juror interviews, the court concluded that the phone call involved no extrinsic evidence or failure to follow instructions and therefore did not support disqualification. 9RP 30. On

reconsideration, when the court ultimately dismissed Juror 3, the court quoted RCW 2.36.110, CrR 6.5, and cited to several pre-Elmore cases. 10RP 11-12. The court also stated the dismissal was based on "good grounds" and was "within its discretion." 10RP 14. Later, in its ruling on the defense motion for a new trial, the court determined "there was a reasonable and good-faith basis to excuse [Juror 3], putting aside however she may have stood in the deliberative process." 11RP 7. At no point did the trial court indicate it was applying the heightened evidentiary standard as required by Elmore. This in itself is reversible error.

3. The Trial Court Erred in Removing Juror 3 Where the Record Shows a Possibility the Removal Was Based on the Juror's Views of the Evidence.

As discussed above, a trial court may not dismiss a deliberating juror if there is "any reasonable possibility" that the impetus for dismissal is the juror's views of the sufficiency of the evidence. Elmore, 155 Wn.2d at 781. Even if the trial court had applied the correct standard, dismissal of Juror 3 was reversible error.

The jury note alleging misconduct shows that Juror 3 had a different opinion regarding the merits of the case than her fellow jurors. The description of the case as "circumstantial" evinced Juror 3's opinion that she did not believe there was enough evidence to convict. The comment

that "the badgering has begun" showed Juror 3 held a minority view in the deliberations. Juror 3's testimony clarified that not only was she in the minority, but she was the lone holdout. 9RP 22. As the lone holdout, Juror 3 disagreed about the merits of the case with all of the remaining jurors, including the complaining juror, and there was a reasonable possibility that her assessment of the case was the impetus for her dismissal.

The state may argue that regardless of the possibility that Juror 3's dismissal was motivated by her views of the evidence, there was still just cause to support the dismissal based on her misconduct. Such an argument is contrary to controlling law. Elmore, 155 Wn.2d at 779 (despite finding that complaining jurors were credible and dismissed juror was not, the trial court should have applied the heightened evidentiary standard to the conflicting evidence and allowed the juror to continue deliberating where there was a reasonable possibility the dismissed juror's views were based on the sufficiency of the evidence); see also Symington, 195 F.3d at 1083-84 (reversal required even though other jurors informed the court that dismissed juror was unable to understand and maintain focus, and unable and unwilling to deliberate); Thomas, 116 F.3d at 611, 613-14 (reversal required even though juror had been the subject of numerous complaints about pre-deliberation distractions and had stated that drug dealing was

commonplace and done out of economic necessity); Brown, 823 F.2d at 594 (reversing conviction based on erroneous dismissal of a juror who by his own admission said he disagreed with and could not go along with the RICO law). Because the record shows Juror 3 had a valid disagreement about the sufficiency of the evidence, her dismissal could not meet the "any reasonable possibility" standard. Juror 3's dismissal was reversible error.

4. The Trial Court Erred in Removing The Holdout Juror.

Elmore held that a trial court's discretion to remove a deliberating juror is very narrowly constrained. Even that limited discretion is further constrained when the parties or the court are aware that the complained of juror is a holdout against conviction. The mere implication that a holdout juror was dismissed because of her evaluation of the evidence can violate the constitutional right to an impartial jury because it suggests to the remaining jurors that the trial court favors a guilty verdict. Elmore, 155 Wn.2d at 772 (citations omitted).

There can be little doubt that the trial court and the parties knew Juror 3 was not inclined to convict. The comment attributed to Juror 3 that it was a "circumstantial" case clearly indicated that she was holding out to acquit. The trial court noted that it was "pretty evident" that the state wanted to remove Juror 3 because she was voting to acquit. 9RP 34. The

state itself argued that the inference from the "circumstantial" case comment was that Juror 3 did not believe Depaz was guilty. 9RP 44. Juror 3 also explicitly revealed the fact that she was the lone holdout. 9RP 22.

As discussed in section C.3., there was a reasonable possibility that Juror 3's opinion on the merits of the case was the impetus for her dismissal. Moreover, the court's reversal of its initial ruling and the timing of the dismissal lends further support to the conclusion that the trial court dismissed Juror 3 to facilitate a guilty verdict. The court originally concluded that Juror 3's conduct did not rise to the level of misconduct that would prevent her from being fair and impartial due to "outside information or influence." 9RP 29-30. The court heard no other evidence on this question. It was only after being informed of the jury's scheduling conflicts for the next week and the jury's continued deadlock that the court began to reconsider its ruling. Even then, the trial court opined that "if the misconduct jumped out and I could say this is clear misconduct, and it has nothing to do with this being a hold-out juror, then I would [excuse Juror 3]." 9RP 39. The court then began backpedaling, even while acknowledging that no new information justified the dismissal. 9RP 42. The court proceeded to verify that one juror was unavailable on Monday, confirmed that the jury was unlikely to reach a verdict within a reasonable amount

of time, dismissed the unavailable juror, and deferred any further ruling on Juror 3's status until Monday morning. 9RP 37-38, 52, 54.

Only after verifying that the two alternates were fit to serve, and thereby insuring Juror 3's dismissal would not result in an immediate mistrial, did the court announce it would reverse its earlier ruling and dismiss Juror 3. 10RP 10-14. In direct contradiction to its original finding, the court now concluded Juror 3 was no longer impartial and was improperly influenced by an outside source, as well as finding that she failed to follow the court's instructions. 10RP 14. The removal of Juror 3 resulted in a guilty verdict that same day. 10RP 19.

As the Thomas court made clear, a trial court "may under no circumstances remove a juror in an effort to break a deadlock." Thomas, 116 F.3d at 625 (citing United States v. Hernandez, 862 F.2d 17, 23 (2nd Cir. 1988), cert. denied sub nom, Quinones v. United States, 489 U.S. 1032 (1989)). Because this is in fact what happened here, the trial court's dismissal of Juror 3 is error requiring reversal.

5. Because Juror 3's Dismissal was Based on an Alleged Failure to Deliberate and Her Refusal to Follow the Law, Elmore is Controlling Authority.

In response, the state may contend that Elmore is distinguishable because the court did not dismiss Juror 3 for engaging in nullification,

failing to deliberate, or refusing to follow the law. Such a characterization would be misleading.

First, Juror 3 did not engage in any misconduct that brought extrinsic evidence into the deliberations. The prosecutor conceded as much and distinguished this case from instances where jurors brought evidence not admitted at trial into the deliberations. 9RP 27. The trial court's initial ruling also found that Juror 3's communication with her husband did not inject any extrinsic information into the deliberations. 9RP 29-30.

Second, the court's final ruling was that Juror 3's dismissal was based on her failure to follow the law as articulated in the court's instructions.² 10RP 14. The court stated that Juror 3 was not following WPIC 1.04, which instructs "each juror to decide the case for him or herself, but only after considering the evidence impartially with fellow jurors. During the deliberations, the juror should not [hesitate] to re-examine your own views and change her opinion if she becomes convinced

² The court also stated that Juror 3 was influenced by an outside source and was no longer impartial. These bases for dismissal lack merit because nothing substantive had changed since the court's original finding that Juror 3 was impartial and fair despite the phone conversation with her husband. 9RP 29.

The trial court's final ruling that Juror 3 was not forthcoming about telling her husband the evidence was "circumstantial" is also not worthy of merit. 10RP 12. Juror 3's testimony was that she did not recall using the term "circumstantial," but she may have because Juror 14 said she had. 9RP 22.

that it is wrong." 10RP 13; CP 48. Thus, the court's ruling was premised on its conclusion that Juror 3 failed to follow the law by refusing to deliberate.³

Finally, the state itself argued that Juror 3 should be dismissed because she was no longer participating in deliberations:

I have strong concerns about this juror's ability to deliberate any further. She's, from my perspective, shut down and she's not willing to consider any other courses of actions in

³ The court also found that Juror 3 "made a commitment" to her husband that she would "stick to her guns." 10RP 13. Although this could be tantamount to a failure to deliberate, the record does not support the finding. Juror 14 testified that she heard Juror 3 say "I will," but did not know to what she was referring. 9RP 16. Juror 3 testified that she said "I will" in response to her husband's asking her to let him know when she was done with deliberations. 9RP 24. Nothing in the record, besides sheer speculation, suggests Juror 3 committed to not changing her mind.

Furthermore, the remark that Juror 3 should "stick to her guns" is no more than what the court itself had instructed her to do. The court's instruction 2 states jurors "should not change [their] honest belief as to the weight or effect of the evidence solely because of the opinions of [their] fellow jurors, or the mere purpose of returning a verdict." CP 68. The trial court even acknowledged that the "stick to your guns" comment was not an opinion on the evidence, but rather "basically saying if that's what you believe, stick with what you believe, which is a form of moral support. He's not telling her -- Or don't change your mind. He's saying, if that's what you believe, stick with it." 9RP 43.

Furthermore, there was ample evidence that Juror 3 continued to deliberate. Juror 3 testified that she was continuing to deliberate. 9RP 25. After learning about the alleged misconduct, the court instructed the jury, including Juror 3, to continue with deliberations. CP 65. The subsequent jury inquiry that their position had not changed "enough to get any closer to a verdict" also belies any suggestion that Juror 3 was failing to deliberate. CP 42.

deliberations, and Your Honor, I would just ask the Court and renew my motion to excuse Juror 3.

9RP 33-34.

Because the trial court dismissed Juror 3 for refusing to follow the law and failing to deliberate, Elmore is controlling. Reversal and remand for a new trial is required.

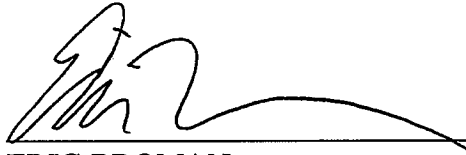
D. CONCLUSION

For the reasons set forth above, this Court should reverse the conviction and remand for a new trial.

DATED this 5th day of September, 2006.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to be 'EB', is written over a horizontal line.

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